



76-SBE-109

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of }
CECELIA M. HARMON }
}

For Appellant: Cecelia M. Harmon, in pro. per.

For Respondent: Bruce W. Walker
Chief Counsel

Kathleen M. Morris
Counsel

O P I N I O N

This appeal is made pursuant to section 18594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Cecelia M. Harmon against a proposed assessment of additional personal income tax in the amount of \$50.64 for the year 1968.

Anneal of Cecelia M. Harmon

Cecelia M. Harmon, hereinafter referred to as appellant, married Lester E. Akins in 1958. She began divorce proceedings against him in February 1968, and was granted an interlocutory decree of divorce on October 1 of that year. The divorce became final on June 20, 1969.

Appellant and Akins filed separate state and federal income tax returns for 1968. After an audit the Internal Revenue Service determined, by using the bank deposit method of reconstructing income, that the spouses had received unreported income during that year. While the record is not entirely clear, it appears that the Service determined that the unexplained income had actually been earned by Akins and not by appellant. However, the Service attributed one-half of the income earned prior to the interlocutory divorce decree to appellant, apparently on the theory that it was community property. Appellant contested the resulting deficiency assessment in the Tax Court, but the assessment was upheld. (Cecelia M. Harmon, T.C. Memo., April 2, 1974.)

Respondent issued the proposed assessment in question on November 6, 1972, acting entirely on the basis of the Internal Revenue Service audit. Appellant protested, but the protest was denied after the Tax Court sustained the federal assessment. This appeal followed.

Appellant contends that she is not taxable on any of the income earned by Akins during 1968 since she did not receive any of it and since she was living separate and apart from Akins. Under California's community property laws as they read during the year in question, however, the earnings of the husband during the course of the marriage were considered community property regardless of whether the spouses were living together.^{1/} (Randolph v. Randolph, 118 Cal. App. 2d 584 [258 P.2d 5473 (1953).]) The wife was

^{1/} Civil Code section 5118, as amended in 1971, provides that a spouse's earnings while living separate and apart from the other spouse are the separate property of the spouse. Section 5118 does not apply retroactively under the circumstances of this appeal, however, since the spouses' respective rights to the community property were apparently finally adjudicated by either the interlocutory or the final decree of divorce. (See In re Marriage of Bouquet, 16 Cal. 3d 583, 594 [___ Cal. Rptr. ___; ___ P.2d ___] (1976).)

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therefore liable for tax on her one-half community interest in her husband's income even though it may have been earned while the spouses were living separate and apart and even though she may not have actually received any of it.

(Appeal of Esther Zoller, Cal. St. Bd. of Equal., Dec. 13, 1960; Appeal of Beverly Bortin, Cal. St. Bd. of Equal., Aug. 1, 1966; Appeal of Ann Schifano, Cal. St. Bd. of Equal., Oct. 27, 1971.) Under the authority of these cases, respondent's action must be sustained.

O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Cecelia M. Harmon against a proposed assessment of additional personal income tax in the amount of \$50.64 for the year 1968, be and the same is hereby sustained.

Done at Sacramento, California, this 15 day of December, 1976, by the State Board of Equalization.

William La Bue, Chairman
W. W. Dwyer, Member
Robert H. ..., Member
Iris Sankey, Member
_____, Member

ATTEST: *W. W. Dwyer*, Executive Secretary